76-1468

No._____

Supreme Court, U. S.
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In The Supreme Court of The United States

April Term, 1977

JOHN F. HENDRIX, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
CITATION TO OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED	3-4
STATEMENT OF THE CASE	4-6
STATEMENT OF FACTS	6-8
REASONS FOR GRANTING THE WRIT	8-11
CONCLUSION	12
CERTIFICATE OF SERVICE	12
APPENDIX "A"--OPINION, NINTH CIRCUIT COURT OF APPEALS	13-26

CITATIONS

	Page
Cases:	
Remmer v. United States, 347 U.S. 227 (1954)	2,10,11
United States v. Klee, 494 F.2d 396	10
United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970)	2,9,11
Statutes:	
Title 8, U.S.C. §1324	2,4,5,6
Title 8, U.S.C. §1324(a)(1)	4,5
Title 8, U.S.C. §1324(a)(2)	2,5,6
Title 8, U.S.C. §1324(a)(4)	4,5
Title 18, U.S.C. §371	2,4,5,6
Title 28, U.S.C. §1254(1)	2
Constitution:	
United States Constitution, Fifth Amendment	3,10
United States Constitution, Sixth Amendment	3,10
Rules:	
Federal Rules of Criminal Procedure, Rule 33	4,5

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PETITION FOR WRIT OF CERTIORARI
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JOHN F. HENDRIX, SR., prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 17, 1977.

CITATION TO OPINION BELOW

The Opinion of the Court of Appeals of January 17, 1977, is not reported at this date, but is set forth verbatim in Appendix "A" of this Petition.

JURISDICTION

On January 17, 1977, the Court of Appeals for the Ninth Circuit entered judgment affirming the criminal conviction of Petitioner of one count of conspiracy to induce, smuggle, and transport aliens, in violation of 18 U.S.C. §371 and 8 U.S.C. §1324, and six counts of illegal transportation of aliens in violation of 8 U.S.C. §1324(a)(2). The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254(1), and Rules 19(b) and 22(2) of the Rules Of The Supreme Court.

QUESTIONS PRESENTED

Whether Petitioner's Fifth Amendment and Sixth Amendment rights were violated by the refusal of the trial court to conduct an investigation and to hold an evidentiary hearing before denying Petitioner's Motion For New Trial based upon a pre-existing bias toward conviction of criminal defendants by one of the jurors in Petitioner's case.

Resolution of the conflict between the decision rendered by the Ninth Circuit in Petitioner's case and the decision rendered by the Fifth Circuit in United States v. McKinney, 429 F.2d 1019 (1970), with the decision rendered by this Court in Remmer v. United States, 347 U.S. 227.

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

Amendment Five of the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Six of the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Rule 33 of the Federal Rules of Criminal Procedure--New Trial:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7 day period."

STATEMENT OF THE CASE

On August 27, 1975, an indictment was filed in the United States District Court for the Southern District of California against the Petitioner, JOHN F. HENDRIX, SR., and co-defendant, FELIPE LUIS-JIMENEZ, and others unknown, charging Petitioner with one count of conspiring to induce, smuggle, and transport aliens in violation of Title 18, U.S.C §371 and Title 8, U.S.C. §1324, four counts of inducing illegal entry of aliens in violation of Title 8, U.S.C. §1324(a)(4), four counts of smuggling aliens in violation of Title 8, U.S.C. §1324(a)(1), and six counts of transporting aliens in violation of Title 8, U.S.C. §1324(a)(2).

Pursuant to the indictment of conspriing to induce, smuggle, and transport aliens, in violation of Title 18, U.S.C. §371 and Title 8, U.S.C. §1324, an overt act was alleged as follows:

> "On or about August 19, 1975, defendant, JOHN F. HENDRIX, SR. drove a vehicle in the Southern District of California."

On November 18 and 19, 1975, defendant was tried before the Honorable Leland C. Nielsen and a jury. On November 20, 1975, the jury returned a verdict in the Petitioner's case of Guilty of violation of one count of Title 18, U.S.C. §371 and Title 8, U.S.C. §1324, Not Guilty of violation of four counts of Title 8, U.S.C. §1324(a)(4), Not Guilty of violation of four counts of Title 8, U.S.C. §1324(a)(1), and Guilty of violation of six counts of violation of Title 8, U.S.C. §1324(a)(2).

On November 25, 1975, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, counsel for Petitioner filed Notice Of Motion And Motion For New Trial with supporting Affidavits and Memorandum Of Points And Authorities on behalf of the Petitioner, based upon statements made by one of the jurors indicating a bias in favor of conviction of defendants in criminal cases and a dissatisfaction with the decisions of the Judges of the United States District Court in criminal cases. The Government filed no pleadings of any nature in response to the Motion,

and on December 8, 1975, the Motion was heard and denied by the Court without conducting any investigation or evidentiary hearing (R. 127-137). (All page references designated with an R. are to the Clerk's Record dated April 30, 1976.)

The matter was referred to the Probation Department for a pre-sentence investigation, and on January 5, 1976, Petitioner was sentenced to pay a fine of $1,500.00 ($250.00 fine on each count of violation of Title 8, U.S.C. §1324(a)(2)) and imposition of sentence was suspended and the Petitioner was placed on probation for three years for violation of Title 18, U.S.C. §371 and Title 8, U.S.C. §1324.

Notice of Appeal was timely filed on January 5, 1976. The Appeal was argued before the United States Court of Appeals for the Ninth Circuit and on January 17, 1977, the Court of Appeals affirmed the decision of the District Court. See Appendix "A", infra.

On March 28, 1977, the Court of Appeals entered its Order denying Petitioner's Request For Rehearing and this Petition follows:

STATEMENT OF FACTS

The Petitioner, JOHN F. HENDRIX, SR., appeared for trial on November 18, 1975 accompanied by his wife, COLLEEN JOY HENDRIX, and his mother-in-law, GLADYS M. KING. At approximately 9:00 A.M., prior to the commencement of court, one of the members of the jury panel, DONNIS J.

THOMPSON, initiated a conversation with MRS. HENDRIX and MRS KING, and inquired if MRS. HENDRIX and MRS.KING were members of the jury panel. MRS. HENDRIX replied that she was not a member of the panel, that her husband was a defendant today. MRS. KING replied that she was not a member of the panel, that her son-in-law was a defendant today. DONNIS J. THOMPSON then made the following statement to MRS. HENDRIX and MRS. KING:

> "Well, I really shouldn't be serving today because my husband is on vacation, and he asked me to get excused so I can join him, because I have served on jury duty several times. But we just had a case where a police woman was tried for selling narcotics and that damn Judge let her go. And she was absolutely guilty. And I am here to see that they put some of these people away. These Judges are absolutely too lenient and they are letting too many people run around."

Thereafter, shortly after 9:00 A.M., court convened and DONNIS J. THOMPSON was selected and sworn as one of the jurors in Mr. Hendrix's case.

On November 18, 1975, at the conclusion of the first day of the trial of Mr. Hendrix's case, at approximately 4:30 P.M., Mrs. Hendrix and Mrs. King informed Mr. Hendrix's counsel of the statements made to them by juror, Donnis J. Thompson at approximately 9:00 A.M. that morning.

On November 19, 1975, prior to the commencement of the second day of trial, Mr. Hendrix's counsel informed the court of the statements made by juror Donnis J. Thompson to Mrs. Hendrix and Mrs. King and requested the court to conduct an investigation to determine if the juror should be replaced. The court informed Mr. Hendrix's counsel that there were no alternates and rejected counsel's request for the court to conduct an investigation or to allow Mrs. Hendrix to state for the record at that time the statements made to her by the juror and restricted counsel's request,to have the court determine any bias or prejudice on the part of the juror, to the filing of an Affidavit by Mrs. Hendrix (T. 179-180). (All page references designated with a T. are to the Reporter's Transcript dated November 18, 1975.)

Thereafter, on November 25, 1975, the Petitioner timely filed a Notice Of Motion And Motion For New Trial with Affidavits of Mrs. Hendrix and Mrs. King and a Memorandum Of Points And Authorities In Support thereof.

The Government filed no pleadings of any nature in response to the Motion and on December 8, 1975, the Motion was heard and denied by the United States District Court without an investigation or evidentiary hearing in the matter

REASONS FOR GRANTING THE WRIT

The decision rendered by the Ninth Circuit, in its Opinion entered January 17, 1977, is in conflict with the decision

rendered by the United States Court of Appeals for the Fifth Circuit in United States v. McKinney, 429 F.2d at 1025-26 (5th Cir. 1970), regarding the duty of the trial judge to conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred, and if it occurred, to determine whether or not it was prejudicial.

The Ninth Circuit, in its Opinion, at Footnote 2, sets forth the rules adopted by the Fifth Circuit in United States v. McKinney, supra as follows:

> "When jury misconduct is alleged in the defendant's motion for new trial, the trial judge has a duty to take the following actions: he must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review.
> Id. at 1026 (emphasis added)."

The Ninth Circuit refused to follow the rules adopted by the Fifth Circuit regarding the duty of the trial judge to conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred, and if it occurred, whether or not it was prejudicial. At Footnote

3, the Ninth Circuit states:

> "We decline to adopt the McKinney rules to the extent that they deprive the trial court of its discretion and flexibility to respond to a broad range of allegations of juror misconduct and bias. We believe that a trial court, in responding to such charges, should be able to discriminate on the basis of their content, their source, and the nature of the alleged misconduct. Indeed, when we recently reviewed a trial court's response to allegations of juror misconduct, we emphasized that not all types of misconduct carry the same risk of prejudice to the parties. United States v. Klee, supra, 494 F.2d at 396."

The failure of the Ninth Circuit to require any investigation or evidentiary hearing by the trial court, upon Mr. Hendrix's Motion For New Trial, is a denial to Mr. Hendrix of his Constitutional rights of due process of law and an impartial jury guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States.

The decision rendered by the Ninth Circuit in Mr. Hendrix's case is in conflict with the decision of this Court in Remmer v. United States, 347 U.S. 227 (1954). In Remmer, this Court sets forth the rule that the trial court should not decide and take final action ex parte upon a defendant's motion for new trial alleging juror misconduct, but should

determine the circumstances in a hearing with all interested parties permitted to participate. The failure of the trial court to conduct any investigation or to hold an evidentiary hearing was tantamount to an ex parte determination of Mr. Hendrix's Motion For New Trial, even though the Order Denying Motion For New Trial was made on December 8, 1975 at a "hearing" on Mr. Hendrix's Motion. (R. 137)

The brief submitted by Petitioner on appeal to the Ninth Circuit contains an exhaustive analysis of the decisions rendered by the Circuit Courts interpreting Remmer v. United States. Additional legal discussion here is superfluous. The conflict between the decision rendered by the Ninth Circuit in Petitioner's case, where the trial court conducted no investigation and permitted no evidentiary hearing, and the rules adopted by the Fifth Circuit in McKinney where it is mandatory upon the trial court to conduct a full investigation to ascertain whether alleged jury misconduct occurred, is a denial of the Constitutional rights of due process of law and to an impartial jury by one Circuit Court of Appeals and the absolute guarantee of those rights by the other Circuit Court of Appeals.

It is important that this Court resolve the conflict between the Ninth Circuit and the Fifth Circuit and the rules of this Court in Remmer v. United States and thereby rectify the clear injustice that has prevented Petitioner from obtaining his right to a trial by an impartial jury.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Ninth Circuit in this case and to decide the questions presented herein.

Respectfully submitted,

Dated: Apr.20,1977

Herman A Hauslein

HERMAN A. HAUSLEIN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition were mailed, postage prepaid, to the Office of the Solicitor General of the United States this 21st day of April, 1977.

Herman A Hauslein

HERMAN A. HAUSLEIN

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,)
)
Plaintiff-Appellee,)
)
vs.)
)
John F. Hendrix, Sr.)
)
Defendant-Appellant.)
)

NO. 76-1090 OPINION

[January 17, 1977]

Appeal from the United States District Court
for the Southern District of California

Before: DUNIWAY, CARTER and WALLACE
Circuit Judges

WALLACE, Circuit Judge:

Hendrix appeals his conviction, after a jury trial, of one count of conspiracy to induce, smuggle and transport illegal aliens in violation of 18 U.S.C. §371 and 8 U.S.C. §1324 and six counts of transportation of illegal aliens in violation of 8 U.S.C. §1324(a)(2). Hendrix raises 11 alleged errors, the most substantial of which is that he was denied his Sixth Amendment right to trial by an impartial jury because one of the jurors was biased. We affirm.

Hendrix's two-day trial occurred on November 18 and 19,, 1975. Prospective jurors were examined and those chosen for the panel were sworn during the morning of November 18. When court recessed that afternoon, the wife and mother-in-law of Hendrix informed his counsel that during the morning, prior to the selection of the jury, Mrs. Thompson, who was subsequently chosen as a juror, allegedly made statements revealing a bias against and a predisposition to convict criminal defendants. Before the trial recommenced on the 19th, Hendrix's counsel informed the court of Mrs. Thompson's alleged bias and requested an investigation to determine if she should be removed from the jury panel. The district judge denied the request and directed counsel to file affidavits.

Within a week after the conclusion of the trial, affidavits of Mrs. Hendrix and her mother were filed. Both stated that Mrs. Thompson, on the morning of November 18, made the following comment:

> "Well, I really shouldn't be serving here today because my husband is on vacation, and he asked me to get excused so I could join him, because I have served on jury duty several times. But we just had a case where a policewoman was tried for selling narcotics and the damn Judge let her go. And she was absolutely guilty. And I am here to see that they put some of these people away. These Judges are absolutely too lenient and they

> are letting too many people run around.

Approximately two weeks after the affidavits were filed, the district court heard arguments on Hendrix' motion for a new trial based on the allegations. The court determined that Mrs. Thompson's comments were made before she was questioned under oath as a prospective juror, during which time she stated "that she wasn't prejudiced." The court then reviewed the affidavits, found them to contain inadequate grounds for a new trial and denied Hendrix' motion.

The facts present two conceptually distinct issues. First, did the district judge commit reversible error in the procedure he followed in responding to the allegations of juror bias? Second, as a matter of law, did the court incorrectly conclude that any bias, if present, was nonprejudicial?

I.

It cannot be gainsaid that a fair system for the administration of justice must include the guarantee of "an impartial jury" for the criminally accused. U.S. Const. amend, VI. See generally Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin v. Dowd, 366 U.S. 717 (1961); Stone v. United States, 113 F.2d 70, 77 (6th Cir. 1940). If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel. E.g., Tillman v. United States, 406 F.2d 930, 937 (5th Cir.), vacated on other grounds, 395 U.S. 830 (1969); Stone

v. United States, supra, 113 F.2d at 77. The trial judge has both a great responsibility and a wide discretion to give meaning to this guarantee. E.a., Nebraska Press Ass'n. v. Stuart, ___U.S.___, 44 U.S.L.W 5149, 5153-54 (June 30, 1976); Sheppard v. Maxwell, supra, 384 U.S. at 358-63; United States v. Doe, 513 F.2d 709 (1st Cir. 1975); Tillman v. United States, supra, 406 F.2d at 937; United States v. Miller, 381 F.2d 529, 539 (2d Cir. 1967), cert denied, 392 U.S. 929 (1968); United States v. Flynn, 216 F.2d 354, 372 (2d. Cir. 1954), cert. denied, 348 U.S. 909 (1955).

An important part of the district judge's broad discretion centers on his response to allegations of juror bias or misconduct. For example, it is within the trial court's discretion to determine whether and when to hold an evidentiary hearing on such allegations. If the judge orders an investigative hearing, it is within his discretion to determine its extent and nature. See United States v. Doe, supra, 513 F.2d at 712; Tillman v. United States, supra, 406 F.2d at 938.1/

1/ Dictum by the Supreme Court in Wade v. Hunter could be read as permitting a trial judge no discretion in determining how to deal with allegation of juror misconduct or bias:

> And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial.

Wade v. Hunter, 336 U.S. 684, 689 (1949) (emphasis added; footnote omitted). Nevertheless, after carefully examining this case and the development of the law since it was decided, we are convinced that the quoted language was not intended as a limitation on a trial court's broad discretion to deal with allegations of jury misconduct.

First, Wade v. Hunter was concerned with the scope and effect of the Double Jeopardy Clause, particularly in the context of a military court-martial. The quoted language comes in a paragraph listing the many ways in which a trial might end prior to a verdict without constituting former jeopardy. The Court itself stated the purpose for making that list:

> What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Id. at 689.

The Court then stated that whether "justice required that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination." Id. This requires reliance on the trial court's "sound discretion" and "conscientious exercise of [its] discretion." Id. at 690, quoting United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). The case read in its entirety, therefore, indicates no intention to limit a trial court's discretion regarding threatment of allegations of juror bias. On the contrary,

that discretion is reemphasized.

Second, in the years since Wade v. Hunter was decided, the discretion of the trial judge to deal with this kind of problem has been repeatedly acknowledged. E.g., United States v. Shanane, 517 F.2d 1173 (8th Cir.), cert denied, 423 U.S. 893 (1975); United States v. Doe, 513 F.2d 709 (1st Cir. 1975); Tillman v. United States, supra, 406 F.2d at 937; United States v. Miller, supra, 381 F.2d at 539; United States v. Flynn, supra, 216 F.2d at 372; cf. Richardson v. United States, 360 F.2d 366 (5th Cir. 1966).

As a matter of common sense, a trial judge in making these decisions will necessarily be directed by the content of the allegations, including the seriousness of the alleged misconduct or bias, and the credibility of the source. See United States v. McKinney, 429 F.2d 1019, 1031 (5th Cir. 1970)(Goodbold, J., dissenting), cert. denied, 401 U.S. 922 (1971)2/

2/ Although it had previously acknowledged the trial court's discretion in dealing with allegation of juror misconduct, see Tillman V. United States, supra, 406 F.2d 937-38, the Fifth Circuit in United States v. McKinney, supra, 429 F.2d at 1025-26, imposed rather rigid rules on the trial court:

> [W]hen jury misconduct is alleged in the defendant's motion for new trial, the trial judge has a duty to take the following actions: he must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review.

Id. at 206 (emphasis added)

Judge Godbold dissented, arguing that the trial judge should be given some leeway in responding to allegations of juror misconduct. Id. at 1031-33. He objected to binding the trial judge "to respond in Pavlovian fashion." Id. at 1031. In particular, he argued that in determining whether and how to investigate allegations, the trial judge should be permitted to discriminate between allegations on the basis of their source (whether a "courthouse rumor, a report from a court official, an affidavit of a juror, [or] a sworn motion") and their content. Id. at 1031-32.

Recently, the First Circuit expressly adopted the McKinney rules, but in doing so, it emasculated the "full hearing" requirement by reemphasizing the trial court's discretion "to determine the extent and type of investigation." United States v. Doe, supra, 513 F.2d at 711-12. It also softened the "adequate specific findings" requirement by stating that:

> We would add that our interest is more in substance than in form; curative action taken by the trial judge and reflected in the record if it provides an adequate basis for review will not be deemed in-

sufficient because of the absence of formal findings.

Id.at 712 n.3.

We decline to adopt the McKinney rules to the extent that they deprive the trial court of its discretion and flexibility to respond to a broad range of allegations of juror misconduct and bias. We believe that a trial court, in responding to such charges, should be able to discriminate on the basis of their content, their source, and the nature of the alleged misconduct. Indeed, when we recently reviewed a trial court's response to allegations of juror misconduct, we emphasized that not all types of misconduct carry the same risk of prejudice to the parties. United States v. Klee, supra, 494 F.2d at 396.

If an evidentiary hearing is held, it has two purposes. The first is to determine the truthfulness of the allegations of juror misconduct or prejudice. If the allegations are found to be true, the inquiry does not end there, however, because not every incident of juror misconduct or bias requires a new trial. United States v. Klee, 494 F.2d 394, 396 (9th Cir.), cert. denied, 419 U.S. 835 (1974); Cavness v. United States, 187 F.2d 719, 723 (9th Cir.), cert. denied, 341 U.S. 951 (1951); see United States v. Shahane, 517 F.2d 1173 (8th Cir.), cert. denied, 423 U.S. 893 (1975); United States v. Goliday, 468 F.2d 170, 171-72 (9th Cir.), cert. denied, 410 U.S. 934 (1973). The court must determine if the bias or prejudice amounted to a deprivation of Fifth Amendment (due process) or Sixth Amendment (impartial jury) guarantees. "The test is whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." United States v. Klee, supra, 494 F.2d at 396. See also Cavness v. United States, supra, 187 F.2d at 723.

In applying these principals of law, we must constantly bear in mind that reversal of the district court's procedural decisions should occur only if we find an abuse of discretion. See, e.g., Tillman v. United States, supra, 406 F.2d 938; United States v. Miller, supra, 381 F.2d at 539; United States v. Flynn, supra, 216 F.2d at 372. As Judge (later Mr. Justice) Harlan said in United States v. Flynn, supra, 216 F.2d at 372: "All of these matters [of juror bias and evidentiary hearings] were for the trial Court's discretion, which, unless we find it clearly abused, we should not disturb." Thus, our task is not to determine if the trial court could have held a more extensive hearing or whether we, had we been the trial judge, would have taken a different approach to the problem. Rather, our review is limited to determining whether the district judge, in view of all the circumstances, so abused his discretion that the defendant must be deemed to have been deprived of his Fifth or Sixth Amendment rights.

Applying this test, we conclude that the rulings of the district judge pertaining to the procedure followed should be sustained. Given the content of the allegations, including the seriousness of the alleged bias, and their source, we do not believe that the district judge abused his discretion by not holding a more extensive hearing or by not

conducting his investigation during or immediately after the trial. In affirming this aspect of the trial court's decision, however, we do not mean to imply that the approach taken to the problem was ideal.3/

3/ Because of the importance of securing and maintaining an impartial jury, a district court could rarely if ever be reversed for conducting too extensive a hearing if the manner in which the court conducts the hearing does not itself prejudice a party. Cf. United States v. Doe, supra, 513 F.2d at 710-11.

In the present case, the district judge could have taken further steps to determine whether the alleged statement was true, and, if true, whether Hendrix was actually prejudiced. He could have questioned Mrs. Thompson during or immediately after trial or at the hearing on the motion for a new trial.

II.

Turning to the second issue--whether the alleged bias was prejudicial--we also affirm the decision of the trial court. Mrs. Thompson's alleged statement4/

4/The record tends to indicate that the trial judge took Mrs. Hendrix' and her mother's affidavits at face value and denied Hendrix' new trial motion on the ground that there was inadequate showing of prejudice.

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does not refer to Hendrix or to his prosecution. Rather, she was speaking of another, already-completed prosecution. Also, her assertion that "she was here to see that they put some of these people away" is unclear because of the ambiguity inherent in the word these. Hendrix argues that she was referring to all criminally accused. Taking the statement in context, however, it appears much more likely that she was referring to those who are "absolutely guilty." Obviously, a desire to convict the absolutely guilty is not inconsistent with a juror's duties.

Further, Mrs. Thompson's statement came, as the trial court determined, before she was examined, and before she asserted her ability to give Hendrix a fair trial and swore to determine the case impartially. As we have stated before, jurors are presumed to have performed their official duties faithfully. Cavness v. United States, supra, 187 F.2d at 723.

> And we adhere to the view that "When twelve jurors sit down to deliberate upon their solemn duty of pronouncing innocence or guilt upon a fellow human each exposes his own particular views of the evidence to the sound judgment of all with the result that tangential views have little chance of survival and practically none of getting eleven approving votes.

Id., quoting Sue Hoo Chee v. United States, 163 F.2d 551, 553 (9th Cir. 1947).

Finally, the nature of the alleged bias is different both in degree and kind from that which courts have traditionally viewed as involving a high risk

of prejudice.

> "This is not a case that involves "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury,"...nor does it involve the influence of the press upon the jury."

United States v. Klee, supra, 494 F.2d at 396 (citations omitted). See also United States v. Shahane, supra, 517 F.2d at 1178-79.

On the basis of these considerations, we are not convinced that Hendrix was denied his right to a trial by an impartial jury. Any juror misconduct or bias did not prejudice Hendrix to the extent that he did not receive a fair trial. United States v. Klee, supra, 494 F.2d at 396.

III.

The remaining ten allegations of error are without substantial merit and can be readily resolved.

Six of the alleged errors arise from Hendrix' efforts--opposed by the government and denied by the district court--to discover and present as exculpatory evidence a subsequent similar act purportedly tending to show lack of knowledge and criminal intent. Hendrix was convicted for picking up and transporting in his taxicab six illegal aliens on August 19, 1975. Two Border Patrol agents, Burns and Eddington, were involved in intercepting Hendrix and his passengers. On September 6 and 7, 1975, Eddington again stopped Hendrix' taxicab and removed an illegal alien. This stop occurred in the same area as the previous interception, but Hendrix was not arrested. It was this second incident and lack of arrest that Hendrix desired to introduce as a "subsequent similar act."

There was no error. The probative value of the proffered evidence was at best minimal; the danger of confusion of the issues, undue delay and waste of time was great. The judge acted well within his discretion in excluding the evidence. Fed. R. of Evid. 403. Likewise, there was no error in the government's and the district court's response to Hendrix' request for discovery of the subsequent happening. Our review of the record convinces us that the court's discovery order was more than adequate, as was the government's compliance. In any event, Hendrix knew more about the incident than did the government.

Hendrix's seventh allegation or error is patently without merit. When stopped by the Border Patrol agents, Hendrix stated that he had received a radio message dispatching him to the area to pick up passengers he was then carrying. Hendrix argues that he was prejudiced by the "government's failure to obtain and preserve all discoverable evidence of taxicab calls" to that area on the day in question. Yet after his arrest, Hendrix admitted that he received no radio dispatch and that his earlier story was a lie. Hendrix could not be prejudiced by the "government's failure to obtain and preserve all discoverable evidence" of a radio dispatch that never occurred.

Three of the claimed errors go to the trial court's refusal to admit an exhibit and the testimony of certain witnesses called by the defense. In each instance, however, the testimony or

evidence was immaterial, was presented without proper foundation or violated the best evidence rule.5/

5/Hendrix attempted to have a union steward testify about the contents of a memorandum from the Sheriff of San Diego County to taxicab drivers containing instructions on picking up persons of Mexican descent. It was this testimony that was excluded under the best evidence rule. However, Hendrix was permitted to testify as to the contents of the memorandum and, in this regard, develop his defense fully. See United States v. Holley, 493 F.2d 581, 583-84 (9th Cir. 1974). Thus, even if exclusion of the steward's testimony were erroneous, it was not prejudicial.

Hendrix has simply failed to carry his burden of proving that these evidentiary rulings were erroneous and so prejudicial as to require reversal. See Hamling v. United States, 418 U.S. 87, 127 (1974).

AFFIRMED.

Supreme Court, U. S.
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No. 76-1468

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN F. HENDRIX, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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JOHN F. HENDRIX, SR., PETITIONER

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial because a juror was biased against him.

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of transporting and conspiring to transport illegal aliens, in violation of 18 U.S.C. 371 and 8 U.S.C. 1324.[1] He received three years' pro-

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[1] Petitioner was indicted on one count of conspiring to transport illegal aliens, in violation of 18 U.S.C. 371, four

bation and a $1500 fine. The court of appeals affirmed in a thorough opinion (Pet. App. A; 549 F.2d 1225).

At the end of the first day of the two-day trial, defense counsel informed the court that one of the jurors, while awaiting voir dire, had allegedly made statements that defense counsel believed demonstrated prejudice; counsel requested an investigation. The court denied the request and instructed counsel to submit affidavits in support of the allegation.

Approximately one week after petitioner's conviction, defense counsel moved for a new trial, submitting affidavits from petitioner's wife and mother-in-law that they had had a conversation with Mrs. Donnis J. Thompson prior to the trial. Mrs. Thompson, then a prospective juror, was reported to have made the following statement (Pet. 7).

> Well, I really shouldn't be serving today because my husband is on vacation, and he asked me to get excused so I can join him, because I have served on jury duty several times. But we just had a case where a police woman was tried for selling narcotics and that damn Judge let her go. And she was absolutely guilty. And I am here to see that they put some of these people away. These Judges are absolutely too lenient and they are letting too many people run around.

---

counts of inducing illegal entry of aliens (8 U.S.C. 1324(a)(4)), four counts of smuggling aliens (8 U.S.C. 1324(a)(1)), and six counts of transporting aliens (8 U.S.C. 1324(a)(2)). He was convicted of the conspiracy charge and the six transportation counts and was acquitted on the other counts (Pet. 4-5).

Mrs. Thompson was subsequently selected to serve on petitioner's jury.

At a hearing on the motion for a new trial, the district court examined the affidavits and denied the motion (Tr. 334-335). In an extensive opinion on which we rely, the court of appeals concluded that the district court did not abuse its discretion in considering the affidavits and ruling that, regardless of the truth of the statements alleged therein, they presented insufficient evidence of prejudice to warrant a new trial (Pet. App. 22 n. 4).

1. As both the district court and the court of appeals noted, the statements were made before the prospective juror had been selected or sworn and before she indicated to the court under oath that "she wasn't prejudiced" (Tr. 334; Pet. App. 15). Mrs. Thompson ambiguously asserted her duty to "put some of these people away," but as the court of appeals concluded, "these people" may well refer to those who are "absolutely guilty" and not, as petitioner claims, all criminal defendants (Pet. App. 23). We note that the jury acquitted petitioner of more than half the counts on which he was indicted (see note 1, *supra*). Given the timing and nature of the juror's statement, the circumstances in which it was allegedly made, and the fact that the verdict indicates that the jurors carefully considered the evidence in the case, there was no abuse of discretion in denying the motion for a new trial.

2. Contrary to petitioner's assertion (Pet. 8-10), there is no conflict between the decision below and

the law in the Fifth Circuit. The original decision in *United States* v. *McKinney*, 429 F. 2d 1019 (C.A. 5), which the decision below discusses (Pet. App. 18-20) and upon which petitioner relies, was heard before a panel consisting of Judges Rives, Goldberg and Godbold. In a 2-1 opinion, Judge Godbold dissenting, the panel announced a rule requiring a hearing whenever juror misconduct is alleged. After rehearing, however, Judge Rives changed his vote and, with Judge Godbold, voted to affirm the conviction, stating:

> We simply chose the wrong vehicle to undertake the development of a general rule as to the duty of a district judge in deciding a defendant's motion for new trial when jury misconduct is alleged. Indeed, I do not think that our Court should in any case undertake to promulgate such a general rule. The past literature on the subject is voluminous and shows that the question has arisen under an almost infinite variety of circumstances. Continued development of the jurisprudence can best be accomplished by deciding each case on its own peculiar facts and circumstances.

United States v. *McKinney*, 434 F. 2d 831, 833 (C.A. 5) (footnote omitted). Judge Goldberg's original majority opinion, upon which petitioner relies, became the minority opinion (*id.* at 833-834). Thus, *McKinney* refused to adopt a general rule requiring a hearing and relied instead on the trial court's discretion, to be reviewed on appeal in light of the circumstances of the particular case. This decision is entirely consistent with the opinion below. Indeed

the court below (apparently unaware of the decision on rehearing) chose to follow Judge Godbold's original dissent (Pet. App. 18-20). There is thus no conflict requiring the attention of this Court.

Nor is the decision below in conflict with *Remmer* v. *United States*, 347 U.S. 227. In *Remmer*, a juror reported a bribe attempt to the judge. The judge consulted with the prosecuting attorneys, ordered an F.B.I. investigation of the incident and, with the prosecutors, received the F.B.I. report and decided to drop the matter. The defendant knew nothing about the alleged bribe attempt, the consultation between judge and prosecutors, the F.B.I. investigation, or the F.B.I.'s report until after the verdict. This Court disapproved the trial court's *ex parte* actions and vacated the conviction. But that case is a far cry from the present one, where the only "*ex parte*" action alleged by the petitioner is the trial court's denial of a motion without hearing. This denial was entered after the court heard from both the prosecutor and petitioner's counsel (Tr. 333-334) and was in no sense "*ex parte.*"

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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CITATIONS

Cases:	Page
United States v. Betner, 489 F.2d 116 (5th Cir. 1974)	2,4
United States v. Chintese, 546 F.2d 135 (5th Cir. (1977)	4
United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970)	1,2,3,4
United States v. McKinney, 434 F.2d 831 (5th Cir.1970)	1,2,3
United States v. Persico, 339 F.Supp. 1077 (1972)	2
United States v. Titsworth, 422 F.Supp. 587 (1976)	2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1468

JOHN F. HENDRIX., SR., Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

The Memorandum Of The United States In Opposition filed by the Solicitor General contends that there is no conflict between the decision below by the Ninth Circuit and the law in the Fifth Circuit as respects the decision in United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970). (Memorandum 3-4)

The Solicitor General contends that Judge Goldberg's original majority opinion, upon which Petitioner relies, became the minority opinion after rehearing, United States v. McKinney, 434 F.2d 831 (5th Cir. 1970) and that this

decision is consistent with the decision below by the Ninth Circuit, and that there is no conflict requiring the attention of this Court. (Memorandum 4-5)

The Memorandum For The United States In Opposition notes that the decision below by the Ninth Circuit failed to cite the decision in United States v. McKinney, 434 F.2d 831 (5th Cir. 1970). (Memorandum 4-5)

Since the decision in United States v. McKinney, 434 F.2d 831 (5th Cir. 1970), the decision by Judge Goldberg in United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) has been cited by the United States District Court, E.D. New York, in United States v. Persico, 339 F.Supp. 1077 (1972) at page 1084 and by the United States District Court, D. Nebraska in United States v. Titsworth, 422 F.Supp. 587 (1976) at pages 589, 591.

The Fifth Circuit continues to cite Judge Goldberg's majority opinion in the United States v. McKinney, 429 F.2d 1019 (1970), upon which Petitioner relies. In United States v. Betner, 489 F.2d 116 (5th Cir. 1974) at page 119, Judge Rives, writing the opinion for the court, states as follows:

> "The duty of the trial court at the time when jury misconduct is alleged was well stated by Judge Goldberg speaking for the majority in United States v. McKinney, 5 Cir. 1970, 429 F.2d 1019, 1026:
>
> > "Implicit in these cases is the assumption that when

> > jury misconduct is alleged in the defendant's motion for new trial, the trial judge has a duty to take the following actions: He must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review."
>
> In that case we remanded the case to the district court with specific directions for an evidentiary hearing and adequate fact findings."

It should be noted that Judge Rives also wrote the opinion for the majority in United States v. McKinney, 434 F.2d 831 (1970). Therefore, the contention of the Solicitor General that there is no conflict between the law in the Fifth Circuit and the decision below by the Ninth Circuit is erroneous, because Judge Rives cites the opinion of Judge Goldberg in United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) as the rule in the Fifth Circuit.

Judge Goldberg's opinion in United States v. McKinney, 429 F.2d 1019 (1970) and Judge Rives opinion (citing Judge Goldberg's opinion) in United States v. Betner, 489 F.2d 116 (1974) was recently cited in United States v. Chintese, 546 F.2d 135 (5th Cir. 1977).

It is therefore respectfully submitted that the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

Dated: 9/28/77

Herman A. Hauslein

HERMAN A. HAUSLEIN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) true copies of the foregoing Petitioner's Reply Brief were mailed, postage prepaid, to the Office of the Solicitor General of the United States on this 29th day of September, 1977.

Herman A. Hauslein

HERMAN A. HAUSLEIN